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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. 291

C. S. HELMIG, Petitioner,

v.

ROCKWELL MANUFACTURING COMPANY, a corporation, and BETHLEHEM STEEL COMPANY, a Corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

C. S. Helmig respectfully prays that a writ of certiorari issue in the above captioned case to review the judgments of the Supreme Court of Pennsylvania rendered therein April 22, 1957 (R. 364); Petition for Reargument (R. 365-368) refused May 28, 1957 (R. 353).

OPINIONS BELOW

The opinions of the Supreme Court of Pennsylvania filed with the judgments to be reviewed (R. 354-364) are reported in 389 Pa. 21, and are appended hereto (App. 1-14); and the opinion of said court on petitioner's prior appeal therein (C. S. Helmig v. Rockwell Manufacturing Company) is reported in 380 Pa. 305, 111 A.2d

118 and appended hereto (App. 14-20). The opinions of the Court of Common Pleas of Allegheny County, Pennsylvania, are unreported and appear in the Record; its opinion in the case of Helmig v. Rockwell Manufacturing Company and Bethlehem Steel Company (R. 319-324) being the subject of the appeal at No. 7 March Term, 1957; its opinion in the case of Helmig v. Rockwell Manufacturing Company (R. 289-293) being the subject of the appeal at No. 6 March Term, 1957; and its first opinion in the said case of Helmig v. Rockwell Manufacturing Company (R. 269-272) being the subject of said prior appeal at No. 181 March Term, 1954; cited at 380 Pa. 305.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Section 1257(3) of the Judicial Code.

Although the Supreme Court of Pennsylvania refused Petition for Reargument, without opinion, on May 28, 1957, the judgments to be reviewed were dated and entered on April 22, 1957. Therefore, time within which this petition for writ of certiorari may be filed expires on July 21, 1957.

QUESTIONS PRESENTED

1. When the decisions of the highest court of a state ignore an admitted fraud upon the court with the result that irrelevant, immaterial, false testimony is the sole basis for judgment *non obstante veredicto* by which the court usurped the function of the jury, and with the further result that the plaintiff-appellant therein has been deprived without due process of law

of his property, including his right to work and earn a living, have not his rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States been violated?

2. When the highest court of a state misconstrues the record facts which are admitted to be true for purposes herein, and misapplies the law applicable thereto pertaining to the doctrine of *res judicata* and the limitation of actions, with the result that plaintiff-appellant therein has been deprived of property including his good name, fame and business as well as his right to be heard and his right to protect and enforce said property rights, has he not been deprived of due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISION INVOLVED

The provision of the Constitution of the United States involved herein is the Fourteenth Amendment, the pertinent portion of which is as follows:

"AMENDMENT XIV

Section 1. . . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law. . . . "

STATEMENT

Petitioner, Charles S. Helmig, a steel broker of Pittsburgh, Pennsylvania, entered into a contract with respondent Rockwell Manufacturing Company on April 7, 1948 (R. 13), which provided that Mr. Helmig would be paid commissions for securing ingots and rolling time for their conversion into steel sheets. Mr. Helmig secured the ingots for Rockwell and then arranged for the rolling time with Bethlehem Steel Company, the availability of which was unknown to Rockwell. Within a few days after Mr. Helmig had performed and had become entitled to his commissions, Rockwell tried to cancel the contract with him and confirmed the cancellation by letter dated April 15, 1948 (R. 14). Subsequently petitioner discovered perchance that immediately after Rockwell canceled his contract, Rockwell and Bethlehem went ahead with his deal which they confirmed in writing on May 3, 1948 (R. 179-182). Accordingly, petitioner sued Rockwell in assumpsit for breach of contract, the complaint (R. 5-11) being filed October 20, 1948, the basis of the action being the wrongful cancellation of the written contract to pay the commissions. The jury rendered a verdict in favor of petitioner in the sum of $177,811.20 (R. 264), currently worth, with interest, substantially in excess of $200,000.00.

In connection with the trial, Rockwell procured the testimony of four witnesses from Bethlehem Steel Company to make it appear that Bethlehem had a policy not to enter into conversion arrangements and similar arrangements through brokers like your petitioner. The purpose of this testimony was to create the impression that petitioner could not perform (after he had per-

formed and thus that Rockwell's cancellation was not in bad faith. It also served the nefarious purpose of smearing petitioner by innuendo and otherwise that his was a so-called "gray market" transaction in order to improperly influence the consideration of the court and the jury, when nothing could be farther from the truth. Although the said testimony was admitted over petitioner's objection that it was irrelevant and immaterial, nevertheless the jury ignored it and returned the verdict for petitioner. However, the common pleas court was improperly influenced thereby (R. 271-272) and granted judgment for the defendant Rockwell *non obstante veredicto* (R. 273) unlawfully usurping the function of the jury. On appeal, the Pennsylvania Supreme Court erroneously affirmed the judgment *n. o. v.* likewise improperly influenced by that insupportable testimony (App. 14-20); and said court denied all petitions for reargument, reconsideration, et cetera (R. 325), the first of which was a timely Petition For Reargument filed January 12, 1955 and denied February 3, 1955 (R. 325) in which petitioner for the first time averred that said denial will have deprived him of his day in court and his right to due process of law under the United States Constitution. This point is mentioned here even though that judgment is not a subject of review herein; because it was the first stage of the prior appeal wherein petitioner was obliged to raise the federal questions because prior thereto he could not anticipate that his federal rights would be violated and until that stage of the proceedings they had not actually been violated.

Petitioner knew that said testimony of Bethlehem procured by Rockwell was false, and particularly because if it were true, Bethlehem should not have dealt

with or through him in the first place. However, at the time of the trial, the burden of disproving the existence of such alleged policy was insurmountable because all evidence was exclusively in the possession, custody and control of Bethlehem. Nevertheless this problem was solved later by after-discovered evidence.

Accordingly, promptly after the Pennsylvania Supreme Court affirmed the judgment *n. o. v.*, to wit, on September 23, 1955, petitioner presented in the common pleas court a Petition For New Trial For After-Discovered Evidence which, as amended, prayed that the court "grant this petition and set the above entitled case for trial; or, in the alternative, that the judgment *n. o. v.* heretofore granted be opened up and vacated and the verdict of the jury heretofore awarded be reinstated" (R. 289). Pursuant to the said petition a rule was granted and in the course of the proceedings petitioner introduced after-discovered evidence from the records of a Federal Trade Commission proceeding (Docket No. 6156) by the United States of America against Bethlehem Steel Company, and others, which proceeding was instituted on July 13, 1954, about eight months after the instant trial. In November, 1955, petitioner secured and introduced therefrom pertinent and material documentary evidence which made it plain that during the time in question respondent Bethlehem was carrying on business similar to the transaction involved herein through brokers and third party intermediaries in the steel business, such as Luria Brothers & Company, Inc.; and that some of the major manufacturers for which Bethlehem entered into such conversion arrangements through brokers were Claymont Steel Company, General Electric Corporation, Underwood Corporation and

Budd Company (R. 335-336). Thus it became quite evident that the aforementioned testimony of the four witnesses procured by respondent Rockwell from respondent Bethlehem was not only irrelevant and immaterial, but also false. There was even further evidence brought to the attention of the inferior court in the form of sworn testimony of one of said witnesses, Austin T. Hunt of Bethlehem, given in his answers to interrogatories in the other case on January 28, 1956 (R. 277-279), more than two years after the jury verdict, which conflicts with his prior testimony herein.

The strength of the above mentioned after-discovered evidence, and perhaps too the fear of prosecutions for perjury, forced respondent Rockwell to admit in a sworn pleading that the testimony concerning Bethlehem's alleged policy not to deal through brokers "is irrelevant and immaterial". This admission is repeatedly averred in Rockwell's Answer to Amendment to Petition for New Trial for After-discovered Evidence (R. 283-286), eliminating from the record the sole basis of the judgment *n. o. v.*, putting the lower court back to the point where the jury verdict was rendered for petitioner. Furthermore, this admission by Rockwell spared the Court from any concern over the value of the after-discovered evidence (which actually met all tests for after-discovered evidence), because with said admission in the record the after-discovered evidence became unnecessary. At this point petitioner abandoned his procedural right to a new trial for after-discovered evidence, and relied upon his property right to have the judgment *n. o. v.* vacated and the jury verdict reinstated by reason of the fraud upon the court (R. 338-339). In further support of this point it should be stated that petitioner's

unanswered, undenied, and, therefore, admitted Petition for Leave to File Additional Amendment to Petition for New Trial for After-discovered Evidence (R. 286-288) which was ordered filed on March 7, 1956, squarely concludes in paragraph 5 "that the judgment *n. o. v.* heretofore entered should be opened up and vacated, and further that the verdict of the jury be reinstated". Nevertheless, the common pleas court on May 23, 1956, ordered "the rule heretofore granted is hereby discharged and the petition is hereby dismissed" and "Eo die, exception noted to plaintiff and bill sealed" (R. 293).

Because all of the foregoing points were ignored by the Common Pleas Court, petitioner hastened to bring them to the attention of the Pennsylvania Supreme Court, in order to obviate the need for a second appeal, in a Petition (R. 333-348). The said Petition averred in paragraph 14 (R. 340): "The lower court's refusal to reinstate the jury verdict, with interest, for the plaintiff has not only had the effect of wrongfully depriving plaintiff thereof, but also discriminatory of his federal rights as guaranteed by the Fourteenth Amendment of the Constitution of the United States and the Civil Rights Acts now embodied in 42 U.S.C.A. secs. 1983, 1985 and 1986 (1954 Supp.)". This petition was denied on June 25, 1956 (R. 326). The same day Hon. Thos. M. Marshall who wrote the Opinion for the Common Pleas Court wrote an apologetic letter to petitioner's counsel admitting that he "was wrong", but on request he would not correct the wrong. Accordingly, Judge Marshall's letter became the subject of a Petition for Reconsideration in the Pennsylvania Supreme Court (R. 349-351), wherein the letter is quoted, and is

averred that it admits an adjudication without full consideration. The said petition for reconsideration was denied on October 6, 1956 (R. 326), followed by the second appeal to the Pennsylvania Supreme Court at No. 6 March Term, 1957.

On August 25, 1955, about one month before the above mentioned Petition For New Trial For After-Discovered Evidence was filed in the said assumpsit action, petitioner instituted also a trespass action against both Rockwell and Bethlehem (R. 297-314) which alleged and specified a continuing conspiracy between them from the time of the breach of contract to the date of filing the complaint, as well as compensatory and exemplary damages to petitioner resulting therefrom; and "wrongfully destroying plaintiff's good cause of action and otherwise injuring the plaintiff in his good name, fame and business, all pursuant to the combination and conspiracy of the defendants herein as aforesaid" (R. 311). Rockwell and Bethlehem each presented a Motion For Judgment On The Pleadings therein, pursuant to which all allegations of the Complaint must be taken as true and all inferences therefrom construed most favorably toward the plaintiff's case. Nevertheless, defendants' motions were granted, the court holding that the action was barred by the six year Statute of Limitations and the doctrine of *res judicata*. The appeal therefrom to the Pennsylvania Supreme Court at No. 7 March Term, 1957; followed. After the Pennsylvania Supreme Court's affirmance in both cases a timely Petition For Reargument was filed by petitioner wherein it was averred in paragraph 7: ". . . Your appellant has been deprived of his rights as guaranteed by the Constitution and laws of the United States, particularly the Fourteenth Amend-

ment to the United States Constitution and the Civil Rights Acts" (R. 368). This was the first stage of the proceedings in the second appeal wherein petitioner was obliged to raise the federal questions because prior thereto he could not anticipate that his federal rights would be violated and until that point they had not actually been violated.

On behalf of respondent Bethlehem an Answer to the said Petition For Reargument (R. 369) was filed. Petitioner's Reply thereto (R. 370-371) closed the pleadings averring that the Answer had "no legal or factual support whatever" and was "refuted by the record"; and for further reply averred:

> 4. The said allegations of Bethlehem contained in their so-entitled Answer warrant a repetition of the argument contained in the last paragraph (p. 5) of Appellant's Reply Brief filed at No. 6 March Term, 1957, as follows: "In view of the foregoing, which makes it quite evident that defendant's contentions are wholly without merit as well as completely lacking in record support, it seems that defendant comes into Court with a wink instead of clean hands, seeking a favor instead of a right."
>
> 5. The said allegations of Bethlehem contained in their so-entitled Answer seem to erroneously presuppose the impossibility of Bethlehem's capacity for fraud and for bearing false witnesses against Mr. Helmig. Bethlehem's said capacity is not only evident herein (pp. 1-4, Appellant's Reply Brief filed at No. 6 March Term, 1957), but is also supported by the records in other matters, and par-

ticularly in the case of the Williamsport Wire Rope Company deal which, inter alia, led to the impeachment of the Honorable Albert W. Johnson, United Sstates Judge of the Middle District of Pennsylvania.

6. By Bethlehem's failure to deny paragraph 2 of the Petition for Reargument, it has again admitted, inter alia, that:

> The contract between plaintiff and defendant was entered into on April 7, 1948 (181 R. 13a). It provided that Helmig would be paid commissions for securing ingots and rolling time for their conversion into steel sheets. Helmig secured ingots and then arranged for rolling time with the Bethlehem Steel Company for Rockwell. Within a few days after Helmig had performed and became entitled to his commissions, Rockwell canceled its contract with Helmig and confirmed same by letter dated April 15, 1948 (181 R. 14a). Later Helmig discovered that immediately after Rockwell conceled his contract, Rockwell and Bethlehem went ahead with his deal which they confirmed in writing on May 3, 1948 (181 R. 179a).

7. By Bethlehem's falure to verify its "Answer", it has diluted and reduced its trial technique of boldly offering false sworn testimony to its current status of timidly offering mere asseverations.

The said Petition For Reargument was refused, without opinion, on May 28, 1957 (R. 353).

REASONS FOR GRANTING THE WRIT

1. Petitioner's right to the jury verdict is a valuable property right. It represents his compensation for services rendered in a business transaction, which he has the right to protect and enforce. An even more important right is petitioner's right to his good name and reputation, which, like his right in the jury verdict, was damaged by the imposition of irrelevant, immaterial, false testimony. After petitioner established the falsity of said testimony, respondent Rockwell admitted that it was irrelevant and immaterial, thus eliminating the sole basis for the judgment *n. o. v.* Even the Common Pleas Court Judge admitted in writing that he was wrong, but took the position that it was too late to correct the injustice. These admissions indeed left the lower courts no alternative but to vacate the judgment *n. o. v.* and reinstate the jury verdict. Timeliness was not in issue, because it is elementary that when a fraud upon the Court is discovered and brought to the Court's attention, the Court should hasten to cleanse the record and rectify the injustices which resulted from the fraud. Incredible as it may seem, the lower courts ignored the fraud and rendered judgments which reflected a complete unawareness of the patent fraud. Instead of welcoming the exposition of the admitted, evident fraud and doing justice for the petitioner who exposed it, the lower courts pretended to decide the assumpsit action on the abandoned point of after-discovered evidence (and even that decision was insupportable and untenable). Thus the lower courts have accepted testimony as relevant and material which is admittedly irrelevant and immaterial; and they have accepted testimony as

true which is evidently false. Thus they have deprived pefitioner unlawfully and discriminatorily of his jury verdict which, with interest, is worth substantially in excess of $200,000.00; of his good name, fame and business; of his right to work and earn a living; and of his right to the protection and enforcement of all of the aforesaid rights. The lower courts' usurpation of the function of the jury in the assumpsit action was in violation of the applicable law; but, assuming *arguendo* said action to be supportable, even then it constituted a deprivation of petitioner's rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States. The following authorities support the foregoing. An essential element of "due process of law" is an opportunity to be heard before reaching a judgment. *Wilson, Inc. v. F.C.C.*, 1948, 170 F. 2d 793, 83 U.S. App. D.C. 176. The right of a litigant to a trial in accordance with the forms of law and with an opportunity to present his claim or defense, if he desires to do so, is a vital part of due process. *Ackerman v. U.S., C. A. Tex.* 1949, 178 F.2d 983, opinion followed in 179 F.2d 236, judgment affirmed 71 S. Ct. 209, 340 U.S. 193, 95 L.Ed. 207. Due process of law extends to every case which may deprive a citizen of property; and requires an orderly proceeding adapted to the nature of the case and in accordance with the law, in which a person has an opportunity before the taking of property to be heard, and to defend, protect and enforce his rights. *Sorensen v. Jacobson*, 1951, 232 P.2d 332, 125 Mont. 148, 26 A.L.R. 2d 1186. The right to work is one of the most precious liberties that man possesses and is a fundamental human right which is protected from improper infringement. *Hanson v. Union Pac. R. Co.*, Neb. 1955, 71 N.W. 2d 526. The

right to earn a living, and the right to a day in court to protect said right are both guaranteed by the Constitution. A person's business, profession or occupation is "property" within constitutional provisions as to due process of law. *Lasdon v. Hallihan*, 1941, 36 N.E. 2d 227, 377 Ill. 187. The right to earn a livelihood is a "property right" which is guaranteed by the Fifth and Fourteenth Amendments. *Carroll v. Local No. 269 I.B.E.W.*, 1943, 31 A.2d 223, 133 N.J. Eq. 144.

2. In the trespass action for conspiracy against Rockwell and Bethlehem, petitioner was denied his right to a day in court. The respondents' preliminary motions, on which judgment was granted for them, admit all of the allegations of the complaint to be true, and all inferences therefrom are to be construed most favorably toward petitioner's case. Therefore, it is admitted that the conspiracy was a continuing conspiracy to the time of filing the complaint therein, and could not possibly be subject to the bar of the Statute of Limitations. Furthermore, it is elementary that the defense of the Statute of Limitations is an affirmative defense which must be pleaded and proved, which was not done herein. On this point, the greatest violence to the record was done when the lower courts decided, with a straight face, that the Statute of Limitations began to run from the commission of the first act in the continuing conspiracy instead of from the last act (which perhaps has not yet even occurred). How could the discrimination against your petitioner and the bias in favor of the respondents become more obvious? Unless and except by the ignoring of the fraud hereinabove shown? Here it should also be pointed out that petitioner was not aware of the

conspiracy until he discovered the fraud, prior to which event the Statute of Limitations could not begin to run.

Also, the doctrine of *res judicata* was involved in the trespass action because of the judgment entered in the assumpsit action, although the parties are different, the nature of the action is different, the recovery sought is different, and the issues are different and have never before been determined or even tried. That doctrine was held to be applicable by the courts below in violation of the law as upheld in all other analogous cases by the Pennsylvania Supreme Court. See *Fisher Building Permit Case*, 355 Pa. 364, 367-8 (1946), which has been followed in other cases including *Burke v. Limestone Corp.*, 375 Pa. 390, 5. On this point, further evidence of discrimination against your petitioner by the Pennsylvania Supreme Court is found in the fact that at the same term of court (March Term, 1957) wherein it misapplied the doctrine of *res judicata* in the instant case (in conflict with its prior decisions which were applicable herein), it contemporaneously reaffirmed the doctrine in line with the law in another case. See *Melcher v. Pennsylvania T. & F.M.C. Insurance Co.*, 389 Pa. 125, 129 (1957). On December 29, 1956, the Pennsylvania Supreme Court also held the obverse to be the law in the case of *School District v. Houghton*, 387 Pa. 236, 128 A.2d 58, opinion by Mr. Chief Justice Jones (p. 242): "*Res judicata*, as is generally known, binds only parties to the conclusive proceeding".

It is indeed evident that the former so-termed "conclusive" proceeding was in assumpsit, against Rockwell only, seeking to recover the profits of a contract which was canceled in bad faith; and that the conspiracy

action is in trespass, against both Rockwell and Bethlehem, seeking to recover exemplary damages as well as damages resulting from a conspiracy to defraud, and to destroy petitioner's good cause of action in assumpsit, and to injure him in his good name, fame and business.

The lower courts ignored petitioner's arguments that their decision on the doctrine of *res judicata* was not in accord with applicable decisions of this Honorable Court, particularly its recent decision in Lawlor v. National Screen Service Corporation, et al., a Pennsylvania case, 349 U.S. 322. The opinion of Mr. Chief Justice Warren therein is authority for holding that the doctrine of *res judicata* is not applicable herein, and especially his holding (p. 869) that there was no obligation to join the new defendants in the prior suit "since as joint tortfeasors they were not indispensable parties; and that their liability was not 'altogether dependent upon the culpability' of the defendants" in the prior suit. Analogously, petitioner herein had no obligation to join Bethlehem in the prior suit against Rockwell; and the liability of Bethlehem was not "altogether dependent upon the culpability" of Rockwell in the prior suit. *A fortiori*, this Honorable Court's said decision should apply herein because the prior suit against Rockwell was in assumpsit for breach of contract, while the instant suit against Bethlehem and Rockwell is in trespass for damages resulting from a conspiracy.

By the decisions in the said trespass action, your petitioner was deprived again of all of the federal rights of which he was deprived in the assumpsit action, and in addition he was deprived of the right to a day in Court, the right to be heard. In other words, in the assumpsit action petitioner was deprived of his rights as guar-

anteed by the Fourteenth Amendment to the Constitution after his opportunity to be heard; and in the trespass action he was deprived of those rights in advance of his right to be heard.

Conclusion.

It is obvious from the foregoing that the Court of Common Pleas of Allegheny County, Pennsylvania, and the Supreme Court of Pennsylvania have donated to the respondents "privileges and immunities" which are prohibited by the Fourteenth Amendment, instead of protecting and enforcing for your petitioner his rights which are guaranteed by the Fourteenth Amendment. In so doing, those courts have so far departed from the accepted and usual course of judicial proceedings as to call for corrective action by this Honorable Court, which is the only remaining forum. Therefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioner

APPENDIX

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

C. S. HELMIG, Appellant, v ROCKWELL MANUFACTURING COMPANY	No. 6 March Term, 1957.
C. S. HELMIG, Appellant v ROCKWELL MANUFACTURING COMPANY and BETHLEHEM STEEL COMPANY.	No. 7 March Term, 1957. Appeals from the Orders of the Court of Common Pleas of Allegheny County at No. 799 January Term, 1950 and No. 1885 October Term, 1955. Both entered May 23, 1956.

Opinion of the Court

Filed: April 22, 1957.

JONES, B. R., J.

The instant controversy involves two separate appeals from orders of the Court of Common Pleas of Allegheny County—one in an assumpsit, the other in a trespass action. The same appellant and factual situation were before this court in the prior appeal, reported at 380 Pa. 305, 111 A. 2d 118. Mr. Justice Chidsey, in the prior appeal, painstakingly stated the facts. Because of this we will restate only those facts which comprise the essence of the present controversy.

In 1948 appellant, a steel broker, undertook to furnish appellee Rockwell Manufacturing Company[1] with steel sheets to be used in Rockwell's business. Appellant agreed to obtain steel ingots for Rockwell and then secure the services of a rolling mill to convert these ingots into steel sheets. In return Rockwell agreed to pay appellant a commission of $35.00 a ton for the finished product. Appellant obtained the requisite ingots and then attempted to secure rolling time from appellee Bethlehem Steel Company[2] for the necessary conversion into steel sheets. Bethlehem refused to roll the ingots, giving as its reason its policy against entering into any conversion agreement in which middlemen were involved. Rockwell then cancelled its agreement with appellant which cancellation is essentially the basis for all three subsequent appeals—the initial and the two present appeals—to this court.

After the cancellation of the agreement appellant sued Rockwell in assumpsit and this court affirmed the lower court's entry of judgment n.o.v. against appellant: *Helmig v. Rockwell Manufacturing Company,* supra.

On September 23, 1955, 17 months after the judgment of the lower court was entered, appellant filed a Petition for New Trial for After-Discovered Evidence which requested, as amended, that either a new trial be granted or, in the alternative, that the judgment n.o.v. be vacated and the verdict of the jury in favor of appellant be reinstated. By order of May 23, 1956 the lower court dismissed appellant's petition and the first of these appeals (No. 6 March Term, 1957) followed.

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1. Hereinafter referred to as "Rockwell".
2. Hereinafter referred to as "Bethlehem".

On August 25, 1955, prior to his petition for a new trial, appellant brought an action in trespass, naming both Rockwell and Bethlehem as defendants, and alleging a conspiracy between them to defraud him of his commission by means of the cancellation of the agreement of 1948. The lower court, by order of May 23, 1956, granted the motions of both appellees for judgment on the pleadings and the second of these appeals (No. 7 March Term, 1957) followed.

The grounds upon which the lower court denied appellant's petition for a new trial or opening of the judgment n.o.v. in the assumpsit action are: (1) that the petition was filed too late and (2) that the after-discovered evidence which was the basis for the petition was available at time of trial, and was neither legally nor factually sufficient to justify appellant's prayer for relief.

The court below was correct in its exposition of the law pertaining to new trials. A petition for a new trial must be filed at the same term in which final judgment is entered, with exceptions allowable only where the court has retained control over the verdict or where there is extrinsic fraud, clerical error, or the like. Whether or not a new trial will be granted to let in new evidence is a matter for the trial court and this court will not reverse unless there has been a clear abuse of discretion. *Philadelphia Suburban Transportation Co. v. DiFrancesco et al.*, 362 Pa. 326, 66 A. 2d 254; *Kingsdorf v. Frank Gamburg, Inc.*, 147 Pa. Superior Ct. 84, 24 A. 2d 140; *McFadden v. Hanft*, 166 Pa. Superior Ct. 261, 70 A. 2d 450; 6 Standard Pennsylvania Practice, §99, p. 350. In the instant case appellant's petition was not

filed until 17 months after the lower court entered judgment and none of the allowable exceptions are herein applicable.

The lower court also accurately discussed the principles of law applicable to after-discovered evidence and astutely applied those principles to the evidence presented by the appellant below, holding that this evidence could have been obtained at the original trial by the exercise of reasonable diligence on the part of appellant, that its only effect would be to impeach the credibility of Rockwell's evidence as to Bethlehem's policy against dealing with intermediaries, and that this evidence of Bethlehem's acts in the years 1951-1953 was irrelevant to the policy of that company in 1948. No authorities need be cited for the proposition that any evidence, to be admissible, must be relevant to the issues of the case. And as the court below stated: "It is well established that in order to grant a new trial on the basis of after-discovered evidence, the evidence must have been discovered since the trial and be such as could not have been obtained at the trial by the use of reasonable diligence; it must not be simply cumulative or merely to impeach the credibility of a witness. Hornick v. Bethlehem Mines Corp., 310 Pa. 225 (1933)." On the basis of the record before us we can find no abuse of the lower court's discretion in refusing to grant a new trial or vacate the judgment n.o.v. on the basis of appellant's alleged after-discovered evidence.

However, appellant seeks to fit still a different string to his bow. Our understanding of appellant's position is that the after-discovered evidence became unnecessary in the court below because, by Rockwell's

alleged admission that Bethlehem's policy against dealing through middlemen was irrelevant and immaterial, "the sole basis for the judgment n.o.v. had been eliminated, leaving the Court no alternative but to vacate it."

The answer to this contention by appellant is plainly and simply that Rockwell admitted no such thing. In its answer to appellant's petition for a new trial because of after-discovered evidence Rockwell repeatedly asserted that the *reason* for Bethlehem's refusal to roll appellant's ingots is irrelevant and immaterial; that the whole crux of the case in assumpsit is Bethlehem's refusal to deal through an intermediary regardless of its reasons therefor and appellant's consequent inability to perform his part of the agreement. By what can only be termed obtuse reasoning appellant has seized upon these averments to argue that Rockwell has admitted and agrees that the *policy*—not Bethlehem's *reasons for the policy*—is irrelevant and immaterial. "Appellant has misconstrued the plain meaning of Rockwell's language and has gone on to reason that the judgment n.o.v. and this court's affirmance of that judgment n.o.v. was based on a ground that Rockwell now admits to be false."

We conclude that Rockwell used the best defense available to it in this action in assumpsit and that appellant has fallen far short of proving, either by his "after-discovered" evidence, or by his claim that Rockwell now admits its defense in this case heretofore was false, that "the lower court erred in not holding that a fraud upon the court had been perpetrated."

Consequently, we hold that the lower court committed no error in dismissing appellant's petition: (1)

because the petition was not timely filed; (2) because the evidence upon which it was based cannot qualify as after-discovered evidence and (3) because the crux of Rockwell's defense stands at present just as it stood at trial and upon the first appeal, i.e., that Bethlehem's refusal to deal through appellant, regardless of its reason therefor, prevented appellant's performance of its part of the agreement and justified Rockwell's cancellation thereof.

Appellant's second appeal is from the lower court's order granting the motions of both Rockwell and Bethlehem for judgment on the pleadings in his action in trespass against them for damages arising from an alleged conspiracy to defraud him of his commissions under his agreement with Rockwell. The lower court held: (1) that appellant's claim against Rockwell is barred under the doctrine of res judicata and (2) that appellant's action is barred by the Statute of Limitations which was raised as a defense by both parties.[3]

We find no error in the lower court's ruling that the trespass action was barred as against Rockwell by the entry of the lower court judgment in the assumpsit action which judgment was affirmed by this court in *Helmig v. Rockwell Manufacturing Co., supra.* Appellant's position that there is no final judgment upon which the doctrine may operate is untenable. The finality and conclusiveness of the original judgment cannot be affected by a petition for new trial filed 17 months thereafter and subsequent to the affirmance of that judg-

3. The period of limitations in a trespass action is 6 years. Act of March 27, 1713, 1 Smith Laws 76, §1; 12 PS 31.

ment by this court. And, as Rockwell aptly points out in its brief, appellant's petition for a new trial was denied and his appeal from that order does not operate as a supersedeas.

In *Wallace's Estate*, 316 Pa. 148, 153, 174 A. 397, this court stated: "Broadly stated, the rule of res judicata is, that when a court of competent jurisdiction has determined a litigated cause on its merits, the judgment entered, until reversed, is forever and under all circumstances, final and conclusive as between the parties to the suit and their privies, in respect to every fact which might properly be considered in reaching a judicial determination of the controversy, and in respect to all points of law there adjudged, as those points relate directly to the cause of action in litigation and affect the fund or other subject-matter then before the court." Appellant argues, however, that the lower court erred in invoking the doctrine of res judicata in this trespass action because the parties are different, the nature of the suit is different, the recovery sought is different and the issues are different and have not yet been tried, or determined. As support for his argument he cites *Fisher Building Permit Case*, 355 Pa. 364, 367, 378, 49A. 2d 626, in which the following language was quoted from *Sigfried v. Boyd*, 237 Pa. 55, 59, 85 A. 72: "In order to make a matter res adjudicata there must be a concurrence of the four following conditions: (1) identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and of parties to the action; (4) identity of the quality in the persons for or against whom the claim is made."

Appellant's position, then, is that application of the doctrine of res judicata is effectively precluded because

he brought this action in trespass for conspiracy while his first action was in assumpsit, because Bethlehem was also named as a defendant in this action while the first action was brought against Rockwell alone, and because in this action he seeks to recover exemplary damages in addition to the loss of his commissions under the cancelled agreement which he claimed in the assumpsit action.

Upon comparison of the instant action with appellant's prior action in assumpsit it becomes immediately apparent that his contentions must fail. The acts complained of in both actions are identical—his position is now, as it was before, that Rockwell wrongfully cancelled its agreement, depriving him of his commissions. Appellant demands the same recovery in this action ($164,500) that he demanded in the prior action. The only difference is that in the instant action he also claims exemplary damages. Appellant would inevitably call the same witnesses and present exactly the same evidence in this second action. In such a situation this court must pierce the technical differences between the two actions, and having done so of necessity find that beneath the camouflage net of the second action stands the first—the identical action which was previously litigated to the fullest extent.

The words of Mr. Justice Kephart, in *Hochman v Mortgage Finance Corporation, et al.*, 289 Pa. 260, 263, 137 A. 252, are particularly apposite here: "It is a general principle of public policy, making for the general welfare, for the certainty of individual rights, and for the dignity and respect of judicial proceedings, that the doctrine of res adjudicata should be supported, main-

tained and applied in proper cases. Nor should its application be restricted by technical requirements, but a broad view should be taken of the subject, having always in mind the actual purpose to be attained. The rule should not be defeated by minor differences of form, parties or allegations, when these are *contrived only to obscure the real purpose,—a second tral on the same cause*[4] between the same parties. The thing which the court will consider is *whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties actually had an opportunity to appear and assert their rights.* If this be the fact, then the matter ought not be litigated again, nor should the parties, by a shuffling of plaintiffs [or, as in this case, defendants] on the record, or by change in the character of the relief sought, be permitted to nullify the rule." See also: *Federal Land Bank of Baltimore v. Putnam et al.*, 350 Pa. 530, 39 A. 2d 581; *Slater v. Slater*, 372 Pa. 519, 521, 522, 94 A: 2d 750; *Goldstein v. Ahrens*, 379 Pa. 330, 344, 108 A. 2d 693.

We hold that appellant's action in trespass, as against Rockwell, is barred by the doctrine of res judicata, the present action involving no more than an attempted retrial of the very issues litigated in the prior action.

The lower court ruled that since Bethlehem was not a party to the first action and was not in any way affected by that action the defense of res judicata is not available to it in this trespass action. However, we are of the opinion that the previous adjudication of the issues raised in this action constitutes a bar to appel-

4. Emphasis throughout supplied.

lant's action against Bethlehem because Bethlehem's liability is based solely upon the act of Rockwell in cancelling the agreement of 1948. The basis for this opinion will be found in the Restatement of Judgments, §99, which provides: "A valid judgment on the merits and not based on a personal defense, in favor of a person charged with the commision of a tort or a breach of contract, bars a subsequent action by the plaintiff against another responsible for the conduct of such person if the action is based solely upon the existence of a tort or breach of contract by such person, whether or not the person has a right of idemnity."

It will readily be seen that our holding under this rule does not require in a strict sense proof of res judicata. The general rule has always been that no party can take advantage of a judgment or decree if he would not also have been concluded by it if the same judgment or decree had been against his interest; it is usually stated that the doctrine applies only to parties to the previous adjudication and their privies: *Appeal of Ghandler*, 100 Pa. 262; *Walker v. City of Philadelphia*, 195 Pa. 168, 45 A. 657.

It has been recognized, however, that a broader ground exists. Thus, in *Bigelow v. Old Dominion Copper Co.*, 225 U. S. 111, 227, 32 S. Ct. 641, 56 L.Ed. 1009, it was said: "It is a principle of general elementary law that the estoppel of a judgment must be mutual. [citing cases] . . . . An apparent exception to this rule of mutuality had been held to exist where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit, upon the same facts when sued by the same plaintiff." The court

then cited *Portland Gold Mining Co. v. Stratton's Independence*, 158 F. 63, 68, wherein it was said: "[ ] . . . it is settled by repeated decisions that the general rule that one may not have the benefit of a judgment as an estoppel unless he would have been bound by it had it been the other way is subject to recognized exceptions, one of which is that in actions of tort, such as trespass, if the defendant's responsibility is necessarily dependent upon the culpability of another, who was the immediate actor, and who, in action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it had it been the other way. And we think it could not well be otherwise, for, when the plaintiff has litigated directly with the immediate actor the claim that he was culpable; and, upon the full opportunity thus afforded for its legal investigation, the claim has been adjudged against the plaintiff, there is manifest propriety, and no injustice, in holding that he is thereby concluded from making it the basis of a right of recovery from another who is not otherwise responsible. To such a case the maxim, 'Interest reipublicae ut sit finis litium,' may well be applied." Much the same reasoning, in which we agree "There is manifest propriety, and no injustice", was also used in *Bruszewski v. United States*, 181 F. 2d. 419, and *Adriaanse v. United States*, 184 F. 2d. 968.

Applying the Restatement doctrine to the facts of the instant case it would indeed be an anomalous situation if Bethlehem could be held liable, as a co-conspirator of Rockwell, for conspring to produce a wrongful

breach of contract when it has been conclusively decided by the lower court and this court that Rockwell did not wrongfully breach its contract with appellant. If the doctrine did not protect Bethlehem in this situation, and it should have to go to trial to defend against this attempt to hold it vicariously liable without Rockwell also present as a defendant, the result would be unconscionable.

In view of our conclusions in this matter we deem it unnecessary to discuss the question whether appellant's complaint pleads a good cause of action for conspiracy against Bethlehem and/or Rockwell.

It is necessary, however, that we consider the applicability of the Statute of Limitations because the lower court held that it constitutes a bar to this action and appellant contends that this was error. The period of limitations in this action, as stated in note 3, supra, is 6 years. The instant action was initiated in August, 1955, more than 6 years after the agreement was cancelled by Rockwell in April, 1948.

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5. The facts of these cases, it should be noted, differ from those of the instant case in that the United States was named as sole defendant in the second suit after a prior suit had failed against a different party. In the instant case, however, Bethlehem was made *codefendant* of Rockwell, Rockwell was the sole defendant in the original case, and Bethlehem's responsibility is entirely dependant upon Rockwell's culpability which, as we have already seen, was proven nonexistent in the prior case. It will readily be seen that the instant controversy presents a stronger basis for the application of the doctrine of the Restatement than do either of the cited cases or any of the earlier cases which apparently contemplate an exception to the doctrine of mutuality

Appellant, however, states that "It is hornbook law that the Statute of Limitations does not begin to run until after the commission of the last act in the conspiracy." Thus, by alleging a "continuing conspiracy" from the cancellation of the contract to the present time, appellant asserts the right to avoid the bar of the statute. Apparently, according to appellant's reasoning, the statute will never begin to run until appellees have either lost, surrendered or compromised their defenses in any action appellant chooses to bring against them. Assuming, *purely arguendo*, that a conspiracy did exist, we are utterly at a loss to understand how such conspiracy could conceivably be considered to have "continued" for this length of time. A conspiracy is actionable only when it produces an overt act which injures the complaining party and the lower court properly held that the only overt act alleged by appellant was the cancellation by Rockwell of its agreement with appellant. The sole basis for appellant's claim for damages is that act and that act alone. No authority need be cited for the proposition that in such a situation no continuing trespass is shown. The lower court committed

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of estoppel only where the relation between the defendants in the two suits has been that of principal and agent, master and servant, or indemnitor and indemnitee. In fact, the instant case is much closer on its facts to *Slater v. Slater*, supra, where, in the second action an additional defendant was named because she and the the defendant in the original action held property as tenants by the entireties. This court held that the first action determined the identical issue presented by the second action, the mere addition of a codefendant was not sufficient to defeat the defense of res judicata by the original defendant and the plaintiff was also barred from proceeding against the codefendant.

no error in holding that this action is barred by the Statute of Limitations.

Order affirmed. Costs are to be paid by appellant.

MR. JUSTICE COHEN TOOK NO PART IN THE CONSIDERATION OF THIS CASE.

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

C. S. HELMIG, Appellant, v. ROCKWELL MANUFARTURING COMPANY, a corporation.	No. 181 March Term, 1954. Appeal from the Judgment of the Court of Common Pleas of Allegheny County at No. 799 January Term, 1950.

Opinion of the Court

Filed: January 3, 1955.

CHIDSEY, J.

This action in assumpsit was brought by the plaintiff, C. S. Helmig, a steel broker, against the defendant, Rockwell Manufacturing Company, a corporation, to recover a broker's commission. The jury returned a verdict in favor of the plaintiff in the sum of $177,811.20. The defendant filed motions for judgment non obstante veredicto and a new trial. The court en banc, deeming the evidence insufficient to impose liability on the defendant, granted defendant's motion for judgment n.o.v. and accordingly refused the motion for new trial. From

the judgment thereupon entered for the defendant plaintiff has taken the present appeal.

In the spring of 1948 the defendant was engaged in the manufacture and sale of various finished steel products. At that time defendant's demand for the use of steel sheets far exceeded its supply. Having no facilities at its own plant for the production of these sheets and the customary channels of trade being unable to furnish defendant's requirements, it was forced to resort to other means of supply. On or about April 2, 1948 the plaintiff informed V. H. Newbaker, defendant's vice-president in charge of purchases, that he knew of one method of acquiring additional rolled steel. He represented to defendant's agent that there was a possibility he could obtain a sufficient quantity of acceptable steel ingots and then have the owner of a rolling mill process and convert the ingots into rolled sheets. As a result of these negotiations the defendant on April 7, 1948 sent the following letter to the plaintiff: "Gentlemen: In consideration for services rendered in procuring 6,000 gross tons of acceptable steel ingots and the yield from the rolling time necessary for the conversion of same into hot rolled, pickled and oiled sheets, we agree to pay to C. S. Helmig a commission of $35.00 per net ton on delivery payable upon presentation and/or our receipt of shipping documents for all sheet accepted at destination designated by us. This commission based on $215.00 per net ton of sheets F. O. B. eastern seaboard. This letter is preliminary to the establishment of an irrevocable letter of credit, said letter of credit to be established in a Pittsburgh bank mutually agreeable on the terms indicated above."

Upon receipt of this letter plaintiff contacted an associate, one Graydon Thomas of Baltimore, Maryland, in fererence to securing rolling time at a mill. Thomas had previously advised the plaintiff that there was available rolling time at the Sparrows Point Mill of the Bethlehem Steel Corporation. Thomas arranged a meeting between the plaintiff and a Mr. Husted, manager of the Baltimore sales office of Bethlehem Steel Corporation, regarding this matter. At the meeting Mr. Husted informed plaintiff and his associate that he was not in a position to discuss the possibility of a conversion arrangement for a customer of the Pittsburgh office and, therefore, referred them to Bethlehem's Pittsburgh representative, Charles H. Cecil. Subsequently Thomas and Newbaker had a meeting with Mr. Cecil in Pittsburgh, at which time they discussed the defendant's requirements. Cecil advised them that he would communicate with the home office and let Mr. Newbaker know what could be done to procure the necessary rolling time. Plaintiff had available 6,000 gross tons of ingots which could be supplied by the Brown Steel Products Company upon specifications satisfactory to the defendant. The day after the meeting with Cecil defendant sent the following letter of cancellation to the plaintiff: "Dear Sir: After contact and discussion with the mill representative to whom you referred us regarding the conversion of steel ingots into hot rolled, pickled and coiled sheets, the mill representative has advised us that they are not interested in any arrangement of this kind. Inasmuch as this conversion of the ingot cannot be consummated with the mill, we are withdrawing and cancelling the arrangement as outlined and stated in our letter of April 7, 1948 to you. Thanking you for your interest, we are

. . . ". A short time thereafter the defendant company was able to procure a comparatively small portion of its requirements by obtaining some steel slabs from A. M. Byers Company without the intervention of a middleman, and these were converted into 359.7 tons of steel sheets by Bethlehem Steel Corporation under an agreement dated May 5, 1948.[1]

Plaintiff's sole contention is that the court below erred in entering judgment for the defendant because the evidence was sufficient to permit the jury to infer that bad faith existed in the withdrawal of its offer. Defendant, on the other hand, denies any bad faith and asserts that through no fault on its part plaintiff did not and could not perform the conditions upon which its offer of compensation was predicated, and therefore it was justified in terminating the employment.

The terms of employment form the foundation of the principal and agent relationship. In the present case the rights and obligations of the parties are governed by the letter of April 7, 1948, written by the defendant to the plaintiff for the express purpose of defining the terms of the arrangement respecting the payment of

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1. Plaintiff estimated that the stipulated 6,000 tons of ingots would yield 4,704 tons of steel sheets which, at the commission rate of $35 per ton, would entitle him to $164,640 which with interest was the amount awarded to him by the jury. For the reasons hereinafter stated, we hold that plaintiff was not entitled to any recovery. But if he were, it is extremely questionable under the pleadings and the evidence that his damages could exceed the sum of $12,589.50, the commission at $35 per ton on the 359.7 tons of steel sheets which defendant received form Bethlehem as the result of conversion of the Byers slabs.

the commission. It provided that a commission was payable if the plaintiff procured (1) 6,000 gross tons of acceptable ingots and (2) the rolling time necessary to convert the ingots into sheets. It is apparent that the parties contemplated a completed transaction for the essential subject matter was steel sheets, not ingots. That the parties themselves so construed the arrangement is evidenced by the plaintiff's own testimony on cross-examination: "Q. . . I believe you have previously stated, that Rockwell was interested only in sheets. A. That's right. Q. Not in ingots? A. That's right. Q. So that you have not completed your transaction until you have taken the ingots and actually put them through the mill and brought them back as sheets; is that correct? A. That is correct."

Plaintiff's evidence discloses that up to the time when he received the letter from the defendant cancelling his agency, he could have procured the ingots but he had received no definite assurance from Bethlehem that it would allow him rolling time to convert the ingots into steel sheets. Defendant in its letter terminating plaintiff's services stated that its reason for such action was Bethlehem's disinterest "in any arrangement of this kind". The plaintiff testified that upon receipt of this letter he telephoned Mr. Newbaker of the defendant company and was informed by him that" . . . the deal had been turned down because it was not of interest to Bethlehem Steel Corporation as it was assigned to them; that is, that they were not interested in having another party particularly interested in the proposition." The undisputed testimony established the fact that Bethlehem refused to convert the Brown Company's ingots because of a company policy against conversion arrangements

where middlemen were involved. Bethlehem's refusal to enter into the transaction because of the participation by an intermediary rendered it impossible for the plaintiff to perform his bargain for admittedly he had no other source of ingots or rolling time available. Negotiations having reached an impasse, defendant was forced to look elsewhere for its requirements and was able to partially satisfy its demands by procuring steel slabs directly from the Byers Company without the aid of a middleman. When Bethlehem learned that the defendant had in contemplation the securing of slabs from this new source, it reiterated its policy in a letter to defendant which read in part: "Our offer to convert is contingent on the slabs being procured direct from Byers without brokers or middlemen."

It is incumbent upon a broker to prove either that a sale was made to the party whom he procured as a purchaser or that the purchaser was ready, able and willing to buy and the failure to make an actual sale was through no fault of the broker or his customer: *Kifer v. Yoder*, 198 Pa. 308, 47 A. 974; *Speer v. Benedum-Trees Oil Company*, 239 Pa. 180, 86 A. 695. Assuming arguendo that plaintiff brought Bethlehem and defendant together, that was but one step in the transaction, for as previously indicated, without rolling time the ingots were absolutely worthless to the defendant. The mere fact that negotiations are begun by a broker with a purchaser, who ultimately buys directly from the owner, does not entitle the broker to remuneration unless his prior acts are the efficient procuring cause of the sale: *Bossart v. Erie Coal Mining Co.*, 276 Pa. 63, 119 A. 731. Here the agent's compensation was dependent upon the accomplishment of a specified result. Unless the prin-

cipal revokes the offer in bad faith, an agent whose compensation is dependent upon the accomplishment of a specified result is not entitled to compensation for services rendered in an unsuccessful effort to accomplish that result, although the principal is thereby benefited, if the services are not part of the bargained for exchange. See Restatement, Agency, §§ 453, 454. Plaintiff's proof fell far short of showing bad faith by the defendant. There was not a scintilla of evidence to justify a finding by the jury that the defendant prevented performance by the plaintiff or that it in any way induced Bethlehem to withdraw from the transaction. On the contrary the evidence clearly established that the break in the chain of causation was absolutely beyond the defendant's control. Plaintiff could not perform his undertaking because under no circumstances would Bethlehem, plaintiff's "customer", consummate the transaction because an intermediary was involved.[2] The right to a commission ended when Bethlehem refused to contract, for the plaintiff's reward was to be measured solely by his success in accomplishing the specified result. The risk of failure and the realization that no commission would accrue for the time and labor expended in fruitless efforts to procure the steel sheets was inherent in plaintiff's terms of employment.

Judgment affirmed.

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2. No inquiry was made as to the reasons for Bethlehem's policy, although they may be surmised. It was sufficient that such policy unquestionably existed and was not controverted. Obviously but for such policy Bethlehem would have earned and therefore benefited far more from the production of 4,704 tons of steel sheets than from the production of only 359.7 tons.